05/31/1996

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

CRYSTAL OIL COMPANY AND CRYSTAL OIL EXPLORATION AND PRODUCTION COMPANY, Plaintiffs	*	**CASE NO. CV 95-2115S**
	*	**JUDGE STAGG**
vs.	*	
ATLANTIC RICHFIELD COMPANY, Defendant	*	**MAGISTRATE JUDGE PAYNE**

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO REFER BANKRUPTCY DISCHARGE ISSUE TO THE BANKRUPTCY COURT

Roger L. Freeman
Joel O. Benson
DAVIS GRAHAM & STUBBS, L.L.C.
Suite 4700
370 Seventeenth Street
Denver, Colorado 80202

Lary D. Milner
ATLANTIC RICHFIELD COMPANY
Environmental Affairs - Legal
555 Seventeenth Street
Sixteenth Floor
Denver, Colorado 80202

W. Michael Adams
Robert W. Johnson
BLANCHARD, WALKER, O'QUIN & ROBERTS
(A Professional Law Corporation)
1400 Premier Bank Tower
Post Office Box 1126
400 Texas Street
Shreveport, Louisiana 71163-1126

ATTORNEYS FOR DEFENDANT,
ATLANTIC RICHFIELD COMPANY

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MAY IT PLEASE THE COURT:

On May 15, 1996, while Atlantic Richfield Company's ("ARCO") motion to transfer venue remains pending before this Court, Crystal Oil Company ("Crystal") filed a motion to refer a single issue in this civil action to the Bankruptcy Judge. This Court should defer consideration of Crystal's motion until ARCO's venue motion has been decided since the granting of a change of venue to the District Court of Colorado would moot this motion. Even without a change in venue, Crystal's motion should be denied for three separate reasons: First, the very reasons urged by Crystal to refer the "Bankruptcy Discharge Issue" to the Bankruptcy Judge -- judicial efficiency and consistency of result -- compel that all issues in this action be determined by a single district court, and not bifurcated and tried before separate courts. Second, Crystal is estopped from seeking a bankruptcy forum for its "Bankruptcy

Discharge Issue" after it deliberately by-passed that forum to file suit in this Court. Third, because the resolution of Crystal's claim will necessarily entail the resolution of conflicting policies between the Bankruptcy Code and CERCLA concerning the applicability of Crystal's bankruptcy discharge to ARCO's claim, this Court is prohibited from referring this proceeding (or any part of it) to the Bankruptcy Judge.

I.

JUDICIAL EFFICIENCY AND CONSISTENCY OF RESULTS COMPEL THE RETENTION BY THIS COURT OF CRYSTAL'S BANKRUPTCY DISCHARGE ISSUE

Although a district court may refer certain cases and proceedings to a bankruptcy judge, such reference may be withdrawn from the bankruptcy court by the district court for cause shown. 28 U.S.C. §157(d).[1] Avoiding duplicative actions involving similar issues before different courts is a well-recognized basis for the withdrawal of bankruptcy reference by district courts. See, e.g., Congress Credit Corp. v. AJC Intern. Co., 42 F.3d 686, 690 (1st Cir. 1994); Big Rivers Elec. Corp. v. Green River Coal Co, Inc., 182 B.R. 751, 755 (W.D. Ky. 1995); In re Sevco, Inc., 143 B.R. 114, 117 (N.D. Ill. 1992); Ameritel Corp. v. Isoetec Comm., Inc., 109 B.R. 965 (D. Or. 1990).

Three causes of action currently sit before this Court in this proceeding: Crystal's bankruptcy discharge claim, ARCO's counter-

[1] Because Crystal chose not to reopen the bankruptcy case until after it had filed this action in district court, this motion concerns whether this Court should refer this issue, rather than whether the bankruptcy reference should be withdrawn.

claim for relief under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601, et. seq., ("CERCLA"),[2] and CEPCO's claim for declaratory relief under the sale documents. The resolution of each of these claims will require the examination and determination of numerous factual issues that are common to all of the claims. For example, the factual analysis of whether ARCO's predecessor had knowledge of the grounds for ARCO's future CERCLA claim against plaintiffs at any time prior to 1986 is important to both CEPCO's contract claim[3] and Crystal's bankruptcy discharge claim under the "fair contemplation" test.[4] Similarly, the facts concerning the degree, type and extent of contamination at the Rico Site at various times are relevant to all three causes of action. Also, facts concerning whether CEPCO was a mere alter-ego of Crystal at the time of the sale of the Rico Site, and whether ARCO and its predecessor were aware of such, are

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[2] ARCO intends to add NL Industries and perhaps other potentially responsible parties as defendants to ARCO's counter-claim in this action.

[3] Rather than respond to ARCO's specific references to examples of ambiguity in the Closing Agreement (see ARCO's Reply Memorandum in Support of Defendant's Motion to Transfer Case to United States District Court for the District of Colorado at 7), Crystal simply repeats in its current memorandum the bald assertion that the agreement is "unambiguous." For the reasons already explained by ARCO and ignored by Crystal, the ambiguity and uncertainty in the contractual provisions will compel the consideration of parole evidence by the court to ascertain the scope of any contractual release.

[4] Under the "fair contemplation" test, a court determines whether a potential CERCLA claimant has sufficient information to give rise to a CERCLA claim before the consummation date of the bankruptcy. AM Intern., Inc. v. Datacard Corp., 146 B.R. 391 (N.D. Ill. 1992).

germane to the bankruptcy discharge issue and to ARCO's counterclaim.

The determination of these and numerous other shared factual issues will demand significant judicial time and energy. Referring the Bankruptcy Discharge Issue for trial before the Bankruptcy Judge would waste time and require duplicative presentation of common facts in two courts. Splitting the case in this fashion would waste judicial resources and risk conflicting findings on identical issues. All three claims should be tried before a single court. Indeed, Crystal has already invoked this Court's jurisdiction, announced its intention to file a motion for summary judgment on all issues and has commenced written and deposition discovery on all issues.

In the cases cited above, the courts sought to promote judicial efficiency by consolidating a bankruptcy proceeding with a separate proceeding that was already pending before the district court. See Congress Credit Corp. v. AJC Intern., Inc. 42 F. 3d at 691; Big Rivers Elec. Corp. v. Green River Coal Co, Inc. 182 B.R. at 755 ("the overlapping of facts, transactions and issues in the two cases . . . is good cause for withdrawal of the reference and consolidation with the district Court proceeding"); In re Sevco, 143 B.R. 114, 117 ("Reducing duplicative proceedings to a single forum serves judicial economy, . . . spares the resources of the parties . . . and serves to protect from inconsistent factual results"); In re Wedtech Corp., 81 B.R. 237, 239 (S.D. N.Y. 1987). Here, in a single proceeding already before this Court, reasons of

efficiency and consistency of result compel that the numerous common factual issues that permeate this action be decided by one finder of fact.

Despite Crystal's assertion to the contrary, there are absolutely no common material issues of fact between ARCO's claim and the claims by the State of Louisiana. The two matters involve entirely different factual scenarios and environmental issues. All of the operative facts relating to ARCO's knowledge in 1986 of its CERCLA claim occurred in Colorado; whereas all of the facts relating to Louisiana's right to assert a pre-bankruptcy claim occurred in Louisiana. It is telling that Crystal's motion and memorandum of law fail to recite a single contested factual issue that is common to the ARCO claim and Louisiana claims.

Nor is there any great degree of overlap of legal issues between the Louisiana and Colorado matters. Any commonality of legal issues between the Louisiana claims and ARCO's claim is wholly irrelevant since a decision on the ARCO claim requires a fact-intensive review reliant on Colorado witnesses and Colorado evidence. Moreover, all legal determinations of the Bankruptcy Judge are subject to de novo review by the district court. 28 U.S.C. §158(a). Thus, it is irrelevant to the cause of efficiency and judicial consistency whether the Bankruptcy Judge or the district court decides the legal questions relating to the ARCO discharge claim.

Crystal also resurrects its tired argument that the Supreme Court's decision in Celotex v. Edwards requires that any case

seeking relief from a bankruptcy court injunction be decided by the issuing bankruptcy court. Crystal's Memorandum at 7. However, as Crystal acknowledges, Celotex held only that litigants cannot collaterally attack a bankruptcy court injunction in another court. As ARCO has repeatedly stated, neither Crystal's Complaint nor ARCO's counterclaim seek to attack or modify any order of the Bankruptcy Judge. Crystal's Complaint seeks only an interpretation of the bankruptcy discharge injunction as to ARCO's CERCLA claim.[5] Federal district courts have concurrent jurisdiction to award declaratory relief interpreting the scope of a discharge injunction. See 28 U.S.C. §1334(b); In re Texaco, Inc., 182 B.R. 937 (Bkrtcy. S.D. N.Y. 1995).

II.

CRYSTAL IS ESTOPPED FROM URGING REFERRAL

As demonstrated by its Motion to Reopen Case filed in the Bankruptcy Court on April 19, 1996 relating to the Louisiana claims, Crystal knew that its cause of action for declaratory relief on the Bankruptcy Discharge Issue against ARCO could have been asserted in the first instance before the Bankruptcy Judge in Shreveport.

Nevertheless, apparently for reasons of litigation strategy, Crystal chose to file this action in this Court. One obvious

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[5] In its Complaint in this action, Crystal seeks only a declaratory judgment that any attempt by ARCO to prosecute a claim under CERCLA as to the Rico Site is barred by Crystal's discharge in bankruptcy. Notwithstanding Crystal's protests to the contrary, Crystal's Complaint does not directly or by implication raise the issues of contempt or of obtaining relief from the discharge injunction (the issue addressed in Celotex v. Edwards).

reason for this choice is that CEPCO's liability to ARCO clearly was not discharged under bankruptcy, so that any bankruptcy court ruling would not resolve this case as it pertains to CEPCO. By its present motion, Crystal seeks to preserve the advantages of this forum for part of this case and simultaneously secure the same separate bankruptcy forum that it deliberately by-passed in favor of this Court.

Where a debtor or its representative elects to by-pass the bankruptcy court in favor of another forum, that party is estopped from later seeking to have the same proceeding referred to the bankruptcy court. In re Braniff Intern. Airlines, 159 B.R. 117, 126 (E.D. N.Y. 1993); cf. 1 Collier on Bankruptcy, ¶3.01[4](c) (15th Ed. 1992) at 3-91. This Court should not allow Crystal to forum-shop the individual issues of this action after it filed this case in this Court, deliberately avoiding the bankruptcy forum.

III.

THE UNCERTAIN INTERFACE OF BANKRUPTCY LAW AND CERCLA COMPELS THE DISTRICT COURT TO RETAIN THIS CASE

Apart from the permissive grounds available to this Court for its retention of this proceeding, the mandatory provisions of 28 U.S.C. §157(d) compel retention. In pertinent part, 28 U.S.C. §157(d) provides:

> The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

A district court is required to withdraw the reference from a bankruptcy judge when it is established that (1) the proceeding before the bankruptcy judge involves a substantial and material question of Title 11 and non-Bankruptcy Code federal law, (2) the non-Bankruptcy Code federal law has more than a de minimis effect on interstate commerce, and (3) the motion for withdrawal was timely filed. Lifemark Hospitals v. Liljeberg Enterp., 161 B.R. 21, 24 (E.D. La. 1993); In re National Gypsum Co., 145 B.R. 539, 541 (N.D. Tex. 1992); see also Sibarium v. NCNB Texas National Bank, 107 B.R. 108, 111 (N.D. Tex. 1989). In the present case, the first criteria is the only one that merits further discussion because the law is clear that CERCLA has more than a de minimis effect on interstate commerce; see In re National Gypsum, 134 B.R. 188, 192 (N.D. Tex. 1991); United States v. Ilco, 48 B.R. 1016, 1021 (N.D. Ala. 1985); and because there is no issue as to the timeliness of the filing of a motion to withdraw.[6]

The legal issue presented to this Court -- whether ARCO is precluded under 11 U.S.C. §§524 and 1141 from asserting a claim under CERCLA against Crystal -- provides a clear example of the interaction between bankruptcy and CERCLA substantive law, and it should not be decided by the Bankruptcy Judge. This issue requires a determination of whether ARCO's CERCLA claim arose prior to Crystal's discharge in bankruptcy. Even Crystal recognized the importance of CERCLA to the dispute by primarily relying on the

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[6] See note 1, supra.

statute as the basis for federal question jurisdiction in this action.[7]

Furthermore, substantial dispute exists concerning the interplay between these two statutes. Tension between CERCLA and the Bankruptcy Code arises because the Bankruptcy Code is "designed to give a debtor a 'fresh start' by discharging as many of its 'debts' as possible," while CERCLA is designed to facilitate the cleanup of environmental contamination which often occurred many years in the past. In re Jensen, 995 F.2d 925, 928 (9th Cir. 1993) (quoting Mirsky, "The Interface Between Bankruptcy and Environmental Laws," 46 Bus. Law. 621, 626 (1991)); Matter of Chicago, Milwaukee, St. Paul & Pac. Ry., 974 F.2d 775, 779 (7th Cir. 1992). Notwithstanding the conflicting goals of these statutes, the Supreme Court has urged the lower courts to try to reconcile the competing purposes of the statutes. In re Jensen, 995 F.2d at 928. See also Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection, 476 U.S. 494, 106 S.Ct. 755, 88 L.Ed. 2d 859 (1986).

In short, as explained by the court in In re Jensen, "[t]he intersection of environmental cleanup laws and federal bankruptcy statutes is somewhat messy." 995 F.2d at 927. Regardless of

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[7] Paragraph 1 of Crystal's Complaint states:

> This action arises under federal question jurisdiction, 28 U.S.C. § 1331, and requires application of the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq. (emphasis added).

whether this action is transferred to Colorado or remains in Louisiana, the district court will necessarily grapple with the "substantial and material" issue of the interaction between the two statutes. As held by the court in In re National Gypsum Co. under similar circumstances, "any exploration of these conflicts [between CERCLA and the Bankruptcy Code] implicates the category of cases that require consideration of both title 11 and CERCLA." 134 B.R. at 193. See also In re Hemingway Transport, Inc., 108 B.R. 378 (Bkrtcy. D. Mass. 1989); Matter of LAJET, INC., 1995 W.L. 72428 (E.D. La. 1995) ("The proceeding will require significant interpretation and substantial material consideration of CERCLA. Since CERCLA has been held to 'affect interstate commerce' for these purposes, see United States v. ILCO, Inc., 48 B.R. 1016, 1021 (N.D. Ala. 1985), withdrawal of reference is mandatory"). Under these circumstances, this Court is required to decline reference of this issue to the Bankruptcy Judge.

The language of 28 U.S.C. §157(a) also requires the denial of Crystal's motion. By that provision, a district court may refer a "case" or a "proceeding" to the Bankruptcy Judge. However, 28 U.S.C. §157(a) does not authorize the district court to refer individual "issues" or other parts of proceedings to the Bankruptcy Judge. See In re S. E. Hornsby & Sons Sand and Gravel Co., 45 B.R. 988, 994 (Bkrtcy. M.D. La. 1985) (quoting the Senate report that "case" refers to the entire bankruptcy case and "proceeding" contemplates contested matters, adversary proceedings and plenary actions under former bankruptcy law); also compare 28 U.S.C.

§157(a) and 28 U.S.C. §157(d), in which district courts may refer only cases or proceedings, but district courts may withdraw the reference for cases, proceedings or parts thereof. By failing to provide in 28 U.S.C. §157(a) for the reference of a part of a proceeding to the Bankruptcy Judge, Congress deliberately prevented district courts from referring individual issues of a pending case to the Bankruptcy Judge.

CONCLUSION

28 U.S.C. §157(a) precludes the referral of an isolated issue in an entire proceeding to the Bankruptcy Judge. Even if the statute permits such a referral, however, policy reasons and the mandate in 28 U.S.C. §157(d) preclude a referral of the Bankruptcy Discharge Issue in this case. The common fact issues found in Crystal's claim, in CEPCO's claim and ARCO's counterclaim, as well as in pending claims to be filed against NL Industries and other potentially responsible parties, can be resolved with a minimum of duplication and risk of inconsistent results before a single district court trier of fact. Moreover, Crystal is estopped from forum-shopping this single issue after it deliberately by-passed the bankruptcy forum to file this action in this Court. Finally, the complex and substantial provisions of CERCLA implicated by this case compel the district court to retain this proceeding, rather than referring a part of it to the Bankruptcy Judge. For the foregoing reasons, Crystal's motion to refer the Bankruptcy Discharge Issue to the Bankruptcy Judge should be denied.

Shreveport, Louisiana, this 31st day of May, 1996.

Respectfully Submitted,

Roger L. Freeman, Colorado Bar #015003
Joel O. Benson, Colorado Bar #024471
DAVIS, GRAHAM & STUBBS LLP
Suite 4700
370 Seventeenth Street
P.O. Box 185
Denver, Colorado 80201-0185
Telephone: (303) 892-9400
Fax: (303) 893-1379

Lary D. Milner, Colorado Bar #13665
ATLANTIC RICHFIELD COMPANY
Environmental Affairs - Legal
555 Seventeenth Street
Sixteenth Floor
Denver, Colorado 80202

BLANCHARD, WALKER, O'QUIN & ROBERTS
(A Professional Law Corporation)

By: _____
W. Michael Adams, Bar #2388, T.A.
Robert W. Johnson, Bar #01444

1400 Premier Bank Tower
400 Texas Street
Post Office Box 1126
Shreveport, Louisiana 71163-1126
Telephone: (318) 221-6858
Fax: (318) 227-2967

ATTORNEYS FOR DEFENDANT,
ATLANTIC RICHFIELD COMPANY

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vs.	§	JUDGE STAGG
ATLANTIC RICHFIELD COMPANY, Defendant.	§	MAGISTRATE JUDGE PAYNE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Defendant's Memorandum in Opposition to Plaintiff's Motion to Refer Bankruptcy Discharge Issue to the Bankruptcy Court has been served upon plaintiffs' counsel of record, Osborne J. Dykes, III, Fulbright & Jaworski, 1301 McKinney, Suite 5100, Houston, Texas 77010-3095, and Albert M. Hand, Jr., Cook, Yancey, King & Galloway, P. O. Box 22260, Shreveport, Louisiana 71120-2260, by depositing a copy of same in the U.S. Mail, properly addressed, with adequate postage affixed thereto.

Shreveport, Louisiana, this 31st day of May, 1996.

OF COUNSEL